PROSECUTOR'S BRIEF

THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION'S QUARTERLY JOURNAL

Prosecution 101

Trial Preparation
Trial Tactics
Objections
Attacking the Defense
Protecting Your Record on Appeal
Measuring Sobriety
Misdemeanor DV Trials
2008 Misdemeanor Charging Guide

(Spring/Summer 2008) Vol. XXX, Nos. 2 & 3

Ten Tips for Protecting Your Record on Appeal

(*or Ten Ways to Improve the Chances Your Guilty Verdict Will Be Affirmed on Appeal*)

by Ronald S. Matthias

#1
Follow the Rules of Engagement.

This might seem obvious, but the best overall way to make sure your conviction survives appellate scrutiny is to avoid committing errors before and during trial. An important corollary to this tip is that you justify your conduct on the record—promptly, completely, and honestly—should it ever be challenged. For example,

- **Charging**: Adding an enhancement for a prior conviction that you did not know about earlier?[1] Be prepared to explain how and when you learned about it, and why you reasonably did not learn about it sooner.[2]
- **Opening statement:** Everyone knows you should not refer to evidence you cannot reasonably expect to prove. It is unethical to do so,[3] not to mention unwise since your opponent will later skewer you for having made "false promises" and "failing to deliver." To be sure, stuff sometimes happens,[4] so as soon as you discover that your actual presentation will unavoidably fall short of your projections, recite for the record (outside the jury's presence) the circumstances that brought you to that point. Do not leave it to the imagination of the appellate court—or worse, the defendant's appellate lawyer—to suggest the reason for any disconnect between your opening statement and your evidence.
- **Examining witnesses**: Have a good-faith basis for believing in the propriety of every question you ask and the existence of every fact implied by your question.[5] So when you ask the defendant's character witness who is testifying that the defendant's character is good, do not impeach him with the, "Well, did you know about X?" question unless you are prepared to prove that X is true.[6] Likewise, if you think the defense has foolishly opened the door to some line of inquiry that you otherwise would not have been permitted to pursue, do not just forge ahead, delighted that your opponent has blundered. At a minimum, broach the subject with the trial court beforehand, detailing your proposed course and explaining why you believe it is appropriate in light of your opponent's own conduct.[7] Acting in accordance with the trial court's approval does not guarantee that your course is not erroneous, but it will make any resulting error mere **judicial error**, rather than **prosecutorial misconduct**. This difference is important not only to your professional reputation, but to the prospect (experience teaches) that the error will be deemed reversible. In all events, consider exercising a little self-restraint. If your opponent really does blunder so badly that you are genuinely entitled to embark upon some devastating line of questioning that otherwise would have been forbidden, and even if your trial judge correctly appreciates as much and pre-endorses your understanding of the situation, it could very well mean your opponent will be found to have provided ineffective assistance of counsel, in which event the case will be reversed for that reason. In short,

continued on page 26

PROTECTING YOUR RECORD ON APPEAL from page 25

if you want your case to survive, take the long view and resist the temptation to exploit every tactical misstep committed by a hapless adversary.

- **Closing argument**: Attack the defendant's evidence, not his lawyer. Your objective is to convince the jury that the defendant's evidence is not worthy of belief, not that his attorney knowingly elicited perjury. Pursuing the latter objective is a bad idea for at least two reasons: First, it is unnecessary, and there is no reason to set the bar higher than your immediate purposes require. Second, appellate courts do not like to see it,[8] in part perhaps because what might seem obvious to you about opposing counsel's complicity in nefarious deeds is not always apparent from a cold record.[9] And while we are on the subject of personal attacks, be careful not to take any gratuitous or inflammatory swipes at the defendant.[10] Again, do not set the bar higher than necessary. It is enough that the defendant is guilty; he need not also be a "revolting bucket of scum." If your evidence really shows that he is, you need not say it. And if your evidence does not sustain that characterization, saying it will only reflect badly on you, both in the eyes of the jury and the appellate court. Finally, never comment on the defendant's failure to testify, even obliquely. It is unconstitutional to do so,[11] and it really irks appellate courts when they see it occur, perhaps because it seems so foolish and gratuitous.[12] After all, it stands to reason that some plausible explanations for the defendant's failure to testify, not all of them flattering to the defendant, will occasionally cross some jurors' minds without any hint from you. To be sure, the jury is admonished not to speculate on the point, and the jury is presumed to follow the court's instructions. But like everything else of human invention, instructions and the jury system itself are not perfect. Overreaching is just bad form, so show a little respect for legal convention.

#2

Do not allow your discovery obligations to distract you: when in doubt, disclose.

Any breach of discovery is a serious matter, but none more than a breach of constitutional dimension under *Brady v. Maryland*[13]: the failure to disclose material exculpatory evidence. The case law in this area seems almost to invite hairsplitting. When is something really exculpatory? What about evidence that seems innocuous or neutral on its face or maybe even seems inculpatory at first blush, but later appears arguably exculpatory because it is inconsistent with other evidence even more exculpatory, and thus provides a basis on which that other evidence can be impeached? And just how exculpatory must evidence be before it will be deemed materially exculpatory, such that its nondisclosure will be deemed reversible error? The answer to the last question will likely turn on the overall force of your evidence as well as that at your opponent's disposal, neither matter being something you can likely assess fully at the moment you find yourself deciding whether to disclose particular items of evidence.

Do not be misled by the cases into becoming a hairsplitter yourself. And in particular, do not regard the fact that appellate judges and lawyers seem to argue interminably about these vexing questions as an invitation for you to obscure or skirt your professional responsibilities with unnecessary complications. My advice is simple: Disclose all relevant evidence, no matter how remotely relevant, except that which you are required to keep secret.[14]

#3

Memorialize your disclosures.

As important as it is to make required disclosures, it is no less important that you be able to demonstrate that you have done so. This is a matter of documentation.

There are many ways to accomplish this. You might wish to insist that opposing counsel sign receipts for each installment of discovery provided. You might prefer to describe in detail the discovery you provided in a letter or series of letters to opposing counsel. Or you might find it prudent to memorialize the extent of your discovery efforts in open court and on the record. Most district attorney's offices have standard operating procedures for effecting discovery, at least when opposing counsel is a deputy public defender. These protocols are ordinarily adequate. But if you have any doubts about their efficacy in a particular case, or if you want to leave nothing to chance for some especially important item disclosed, redouble your efforts to document the extent of your disclosure.

#4
Memorialize your NON-disclosures.

Likewise, carefully document what you do not disclose. If, for example, you are in possession of confidential or privileged material that you believe you must withhold, submit it to the trial court for in camera examination. (The examination will be conducted ex parte, but give your opponent notice that you have requested that the examination take place.)[15] Though your claim of privilege or confidentiality might be facially valid, it might be that disclosure is still required to ensure the defendant receives a fair trial. Without involving the trial court in that determination, you will not likely learn of any miscalculation on your part until the case proceeds to appeal or habeas corpus. Of course, if the trial court agrees with your assessment, your nondisclosure is not only less likely to be erroneous, but if it is, its less likely to be deemed prejudicial to the defendant's fair trial rights.

#5
Secure necessary waivers.

There are many events that might occur during the course of trial that require the defendant's personal waiver.[16] Know what they are, and make sure the necessary waiver is effected. For example, if a defendant, who had earlier bifurcated his priors, is convicted and claims to be willing to admit the priors or have their truth determined by the court rather than the jury, insist that he waive his right to jury trial on the priors before the jury is discharged.[17]

#6
Put EVERYTHING on the record.

Every event or discussion relating to the trial proceedings must be reported. There is actually no authority for going "off the record" in the middle of a trial. To be sure, there will be occasions when certain discussions or events should be sealed, but that is no justification for not having them duly reported and available for transcription.[18] Although it is not required that the court reporter take down and transcribe a tape recording or video that is itself introduced into evidence, the proponent of the electronic recording must furnish the trial court and opposing counsel with a typewritten transcript of the recording's contents. The transcript, in turn, must be marked for identification, filed in the trial court's file, and included in the clerk's transcript on appeal.[19]

7
If you should get *Wheeler*-ed,[20] explain your conduct on the record even when the trial court rejects the defendant's claim and finds no prima facie showing.

Your reasons and explanations for exercising peremptory challenges will almost certainly buttress the trial court's finding that no prima facie case was established. Alternatively, they will ably demonstrate why any prima facie case that arguably

continued on page 28

PROTECTING YOUR RECORD ON APPEAL from page 27

should have been found was effectively rebutted.[21] Once you have provided those reasons, press the trial court to make an explicit factual finding, crediting (or rejecting) each of your explanations.[22]

#8
Be clear.

If it was important enough at trial to elicit details from a witness, make sure those same details are comprehensible to anyone reading the written transcript. Avoid making a record that reads like this:

Q: Officer, where were you standing when you first observed the suspect?
A: Right about here.
Q: So, closer to here than to over here?
A: Well, more like midway between here and here. Maybe a little closer to here, and slightly back to this side here.
Q: So, here?
A: Yeah, and then when he moved, I did too, of course.
Q: So, where did you go?
A: As the defendant moved in this direction, I shuffled laterally over here, going like this, in this general direction. Then when he started toward here, I changed my direction to achieve this kind of angle on him. Like this. [Indicating].
Q: Thank you, officer. That's very helpful. One last thing, officer. How tall did the suspect appear to be to you?
A: Oh, about my height. Maybe an inch taller.
Q. Thank you.

#9
Remember that everything you say in the trial court will be read by the appellate court.

Accordingly, if the admission of certain evidence is later found to be erroneous, a reviewing court will be inclined to find its admission prejudicial if you ever characterized that same evidence as the "key to the case" or your "best piece of evidence."[23] Be just as careful what you say to the trial judge alone. Sessions conducted outside the jury's presence might seem like "breaks" during trial in the sense that they lack some of the air of formality that prevails during the main proceedings, but do not let your hair down too much. Finding yourself outside the jury's presence should not be regarded as an invitation to make sarcastic comments that might be later misconstrued. For example, do not remark in jest that you had "almost heard opposing counsel snoring" during your cross-examination of the defendant unless you later want to see your comment invoked in support of an allegation that counsel provided ineffective assistance by "sleeping during key portions of the trial."

#10
The Attorney General is your friend, so remember to call and write.

We in the Attorney General's Office strive to foster effective communication with District Attorneys' Offices. We are here to help, so if you find yourself on the brink of making a tactical choice and you are unsure of the implications of your decision for later review, give us a call and allow us to help you think the situation through. Once you have secured your hard-fought verdict and the defendant has filed his opening brief, call us again to talk with our assigned deputy. (Likewise, if we should

call you first, please return the call.) We find it very helpful to hear your perspective on the issues raised on appeal. We would also be grateful if you call our attention to any events or circumstances that might have been important below but will likely go unmentioned by the appellant. For example, it is crucial that we be aware of any important rulings by the trial court that were adverse to the People, such as a ruling suppressing a confession or other incriminating evidence. In appropriate cases, we can attempt to secure review of those rulings on appeal, a course that might help us in our efforts to avert reversal altogether or improve the People's position in the event a retrial is required.[24]

ENDNOTES

1. Penal Code § 969a.
2. See *People v. Valladoli* (1996) 13 Cal.4th 590, 590, 608; see generally *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 368–375.
3. See *People v. Gates* (1987) 43 Cal.3d 1168, 1212.
4. See generally 5 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) Trial § 518, pp. 738–741.
5. See *People v. Young* (2005) 34 Cal.4th 1149, 1186.
6. See *People v. Clair* (1992) 2 Cal.4th 629, 682–685.
7. Compare *People v. Bell* (1989) 49 Cal.3d 502, 531–534.
8. See *People v. Jones* (1997) 15 Cal.4th 119, 168.
9. See *People v. Sandoval* (1992) 4 Cal.4th 155, 183–184.
10. See *People v. Fosselman* (1983) 33 Cal.3d 572, 580.
11. *Griffin v. California* (1965) 380 U.S. 609.
12. See *People v. Hardy* (1992) 2 Cal.4th 86, 153.
13. *Brady v. Maryland* (1963) 373 U.S. 83.
14. See *Kyles v. Whitley* (1995) 514 U.S. 419, 439.
15. E.g., *People v. Roberts* (1992) 2 Cal.4th 271, 307–308.
16. E.g., *People v. Ernst* (1994) 8 Cal.4th 441, 444–445 (trial by court rather than jury); *People v. Lang* (1989) 49 Cal.3d 991, 1025 (jury view of crime scene conducted without defendant's presence); *People v. Davis* (2005) 36 Cal.4th 510, 531 (discussion with court concerning substantive evidentiary matters conducted in defendant's absence); *People v. Avila* (2006) 38 Cal 4th 491, 598 (testimonial readback provided without defendant's presence).
17. Penal Code § 1164(b); see *People v. Saunders* (1993) 5 Cal.4th 580, 589.
18. Cal. Rules of Court, rules 8.320(c), 8.328, 8.610(a)(2), (b)(2).
19. Cal. Rules of Court, rules 2.1040, 8.320(b)(11).
20. See *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277; *Batson v. Kentucky* (1986) 476 U.S. 79, 91.
21. See *People v. Bonilla* (2007) 41 Cal.4th 313, 343 fn. 13.
22. See *Snyder v. Louisiana* (2008) ___ U.S. ___, ___, 128 S.Ct. 1203, 1209.
23. See *Kyles v. Whitley* (1995) 514 U.S. 419, 446.
24. See generally Penal Code § 1252; e.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 fn. 50.

A prosecutor since 1984, Ron Matthias is a Senior Assistant Attorney General in San Francisco and serves as Statewide Capital Case Coordinator. He has argued cases before the Supreme Court of the United States, the California Supreme Court, the United States Court of Appeals for the Ninth Circuit, and various other state and federal courts throughout California. He graduated with highest honors from the State University of New York, Oneonta in 1978, and received his law degree in 1981 from the University of South Carolina where he was an editor on the law review. His principal professional interests include capital litigation, legal ethics, and habeas corpus; his passions are baseball, non-fiction reading, and his family, although not in that order.